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Nos. 84-1353, 84-1354

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

JAMES P. KARTELL, et al.,
Petitioners,
v.
BLUE SHIELD OF MASSACHUSETTS, INC., et al.,
Respondents.

GRANT V. RODKEY, et al.,
Petitioners,
v.
BLUE SHIELD OF MASSACHUSETTS, INC., et al.,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION OF THE RESPONDENT MASSACHUSETTS COMMISSIONER OF INSURANCE

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QUESTION PRESENTED

Is it a violation of the Sherman Act, § 1, for a state-regulated medical insurance company to enter into agreements with individual doctors in which the doctor agrees to a prohibition, now imposed directly by Massachusetts statute, against charging insured patients any additional amount above and beyond what the insurance company has paid to the doctor for a covered service?

PARTIES

This Brief in Opposition is submitted on behalf of the Massachusetts Commissioner of Insurance, who intervened as a defendant in the district court and was an appellant in the court of appeals. The Commissioner did not receive the petitions until March 1, 1985.

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The Massachusetts Commissioner of Insurance ("Commissioner") adopts the statements of "Opinions Below" and

"Pertinent Statutes" of the Brief in Opposition of the respondent Blue Shield of Massachusetts, Inc. ("Blue Shield").

STATEMENT OF THE CASE

To Blue Shield's "Statement of the Case," the Commissioner adds:

Blue Shield is a non-profit medical service corporation organized under Mass. Gen. Laws Ann. ch. 176B for the statutory purpose of providing low-cost medical insurance coverage to the Massachusetts public. See Massachusetts Medical Service v. Commissioner of Insurance, 344 Mass. 335, 337-38, 182 N.E.2d 298, 300-01 (1962). It is the only entity in the Commonwealth organized and operating under Chapter 176B, which "establishes a comprehensive scheme for the public

supervision of medical service corporations." Nelson v. Blue Shield of Massachusetts, Inc., 377 Mass. 746, 750, 387 N.E.2d 589, 592 (1979):

> The Commissioner must approve Blue Shield's articles of organization (§ 2), its by-laws (§ 3), the form of its agreements with participating providers and its methods of compensating them (§ 4), its subscription certificates and the rates it charges subscribers (§§ 4, 6). He has free access to its records, may examine its employees as to its affairs, and may prescribe the manner in which its records are kept (§ 9). He may enforce the provisions of the statute through judicial proceedings (§§ 13, 17). Moreover, § 12 provides for administrative decision, subject to judicial review, of any dispute between Blue Shield and a participating physician, or between Blue Shield and a subscriber.

Id. In exercising his regulatory authority, the Commissioner has sought to guard against excessive physicians' costs to Blue Shield subscribers, in support of

the public policy underlying ch. 176B of health care cost containment.

The "ban on balance billing," which was challenged by the petitioners in this case, and which provides that participating doctors may not charge their patients who are Blue Shield subscribers any additional amounts above and beyond what Blue Shield pays to the doctor for a covered service, has long been part of the Blue Shield reimbursement system established under Mass. Gen. Laws Ann. ch. 176B. Kartell v. Blue Shield of Massachusetts, Inc., 384 Mass. 409, 414-18, 425 N.E.2d 313, 316-18 (1981). The Commissioner has not merely approved this provision in the course of his supervision of Blue Shield; in 1976 and 1977, shortly before the commencement of this litigation, he rebuffed a proposal to

relax it.[1] The Commissioner intervened as a defendant in 1979 to assert its lawfulness by virtue of the state action doctrine and of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015.[2]

The district court's decision striking down the ban on balance billing, Kartell v. Blue Shield of Massachusetts, Inc., 582 F. Supp. 734 (D. Mass. 1984) (Pet. A28), appeared likely to have a

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1/ See ¶ 37 of the Stipulation of Facts appearing at pp. 96-97 of the joint appendix in the Court of Appeals; Kartell, supra, 384 Mass. at 421, 425 N.E.2d at 320 (referring to the Commissioner's compulsion of the ban since 1968).

2/ These arguments were rejected in Kartell v. Blue Shield of Massachusetts, Inc., 542 F. Supp. 782 (D. Mass. 1982). The district court's rationale for rejecting the state action argument -- that statutory compulsion was lacking, id. at 788 -- has now been rejected by this Court in Southern Motor Carriers Rate Conference, Inc. v. United States, No. 82-1922 (March 27, 1985).

dramatic effect upon the consumers of physicians' services in Massachusetts, in light of the substantial potential increases in health care costs to Blue Shield subscribers. The Governor of the Commonwealth of Massachusetts promptly introduced corrective legislation, advising the legislature that:

> The legislation accompanying this message is filed in response to a recent decision by the United States District Court for the District of Massachusetts relating to Blue Shield of Massachusetts. The court has ruled that Blue Shield's ban on balance billing is precluded by the federal antitrust laws in the absence of a clear expression of state policy requiring it. Because the District Court does not believe that a sufficient expression of state policy exists, corrective legislation is required to supply it.

Mass. House Doc. No. 5624 (April 6, 1984). The Legislature thereafter

passed and on July 12, 1984, the Governor signed Mass. St. 1984, c. 192, which adds the following language to Mass. Gen. Laws Ann. ch. 176B, § 7:

> No participating physician or other participating provider of health services shall charge to or collect from a subscriber or covered dependent any amount in excess of the amount of compensation determined and allowed by a medical services corporation pursuant to the applicable method of compensation approved by the commisioner, [with certain defined exceptions].

St. 1984, c. 192, § 1.[3/]

The Commissioner and Blue Shield, whose appeals were then pending in the First Circuit, both moved to vacate the district court's decision and to dismiss the Amended Complaint on the basis that the new statute clearly immunized the

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3/ The full text is reproduced in Blue Shield's Brief in Opposition at 38a-41a.

ban on state action grounds and rendered the merits moot, since only injunctive relief was sought by the Amended Complaint. The court of appeals did not reject this argument; instead, in light of a related pending damages complaint, and because decision of the merits would resolve all the pending claims in this protracted litigation, the court of appeals chose simply to proceed directly to the merits. Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922, 924 (1st Cir. 1984) (Pet. A5).[4/]

4/ Ignoring the court's clear statement to the contrary, id., the petitioners in No. 84-1354 say that the First Circuit "plainly rejected" this argument, because mootness goes to Art. III jurisdiction. Reply Brief in Support of Petition ("Reply Brief") at 3-4. The point of the Commissioner's motion, of course, was not that the case was moot, but that the merits need not be reached in light of state action immunity.

SUMMARY OF ARGUMENT

The Commissioner fully supports the argument in Blue Shield's Brief in Opposition that these petitions should be denied because the decision of the court of appeals is in harmony with decisions of this Court, recent decisions of four other courts of appeals, and the weight of scholarly comment. The Commissioner writes separately to emphasize the impact of Mass. St. 1984, c. 192, particularly in light of this Court's recent decision in Southern Motor Carriers Rate Conference, Inc. v. United States, No. 82-1922 (March 27, 1985).

The enactment of Mass. St. 1984, c. 192 removed any doubt about the immunity of the ban on balance billing under the state action doctrine. Moreover,

Southern Motor Carriers now makes clear that even without the new state law, the ban on balance billing was entitled to state action immunity. The petitions should be denied because any reversal of the court of appeals' determination of the merits (which was correct in any event) would not, in light of state action immunity, change the result in this case.

ARGUMENT

REVIEW OF THE MERITS WOULD BE OF NO PRACTICAL SIGNIFICANCE IN THIS CASE BECAUSE THE STATE ACTION DOCTRINE CLEARLY REQUIRES THE SAME RESULT.

Prior to the enactment of Mass. St. 1984, c. 192, doubt may have existed as to whether the ban on balance billing was immune under the state action doctrine. The district court had held that

in the absence of compulsion by the state legislature the ban on balance billing could not qualify for state action immunity. Kartell v. Blue Shield of Massachusetts, Inc., 542 F. Supp. 782, 788 (D. Mass. 1982). The appeals which were pending in July 1984 presented issues concerning the analysis and application to this case of the state action doctrine. These arguments were rendered moot by the passage of Mass. St. 1984, c. 192.

A. The Statutory Prohibition of Balance Billing by c. 192 is Clearly the Action of the State.

As the direct and explicit command of the Massachusetts Legislature, the statutory prohibition of balance billing is clearly the action of the State

within the meaning of the state action doctrine.

This Court held in Parker v. Brown, 317 U.S. 341 (1943), that Congress in enacting the Sherman Act did not intend to restrain "state action." Id. at 351. In adopting the program there challenged, the state, "as sovereign, imposed the restraint as an act of government which the Sherman Act did not intend to prohibit." Id. at 352. Last term, this Court reaffirmed that "under this Court's rationale in Parker, when a State Legislature adopts legislation, its actions constitute those of the State, see [317 U.S.] at 351, and ipso facto are exempt from the operation of the antitrust laws." Hoover v. Ronwin, 467 U.S. ___, 104 S. Ct. 1989, 1995 (1984). See also New Motor Vehicle Board of California v.

Orrin W. Fox Co., 439 U.S. 96, 109 (1978). Since the ban on balance billing is now an express statutory provision, nothing further is required to demonstrate state action immunity.[5/]

The tests of California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), are intended in appropriate cases to assure that action claimed to be that of the state is indeed so attributable. Since the new state law is undeniably the action of the state, there is no need to conduct

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5/ The Reply Brief at 5, n. 6 argues that the statute is preempted by 29 U.S.C. § 1144(a). Even if it did "relate to" employee benefit plans (which it does not), ch. 176B, including this amendment, clearly is a law "regulating insurance" under 29 U.S.C. § 1144(b)(2)(A). Cf. Metropolitan Life Insurance Co. v. Massachusetts, No. 84-325 (argued Feb. 26, 1985).

any inquiry under Midcal. "Where the conduct at issue is in fact that of the state legislature . . ., we need not address the issues of 'clear articulation' and 'active supervision.'" Hoover, supra, 104 S. Ct. at 1996. Chapter 192 does not operate indirectly through a state representative or a private party; by its express terms, it operates as a direct prohibition upon participating physicians themselves.

In any event, the Legislature's intent to prohibit balance billing of Blue Shield subscribers could hardly have been articulated more clearly or expressed more emphatically. See p. 7, above (quoting St. 1984, c. 192).[6/] Such

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6/ The state policy unmistakeably established by St. 1984, c. 192, § 1 is no

(footnote continued)

direct and specific legislative compulsion often is the best evidence of a clearly articulated and affirmatively expressed state policy. See Southern Motor Carriers, supra, slip. op. at 13.

Moreover, the statute was enacted in direct response to a judicial determination that the conduct which it requires is otherwise a violation of the Sherman Act, and it was clearly intended to countermand that result -- dramatic evidence of legislative intent to invoke the state action doctrine. The federalism concerns

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(footnote continued)

less clear because of its three precisely-defined statutory exceptions. Contra, Reply Brief at 4. The petitioners ignore the practical realities which both counsel and limit the scope of those exceptions and, with respect to the third exception, the express requirement of the Commissioner's prior approval.

underlying the state action doctrine should apply most strongly under such circumstances.[7/]

B. This Court's Recent Decision in Southern Motor Carriers Confirms the State Action Immunity of the Ban Even Without the New State Law.

This Court has just held that: (1) compulsion is not an essential ingredient of state action immunity, Southern Motor Carriers, supra, slip op. at 11; (2) a

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7/ Although the express statutory prohibition obviates the need for a supervision inquiry, which serves essentially the evidentiary function of ensuring that the actor is engaging in the challenged conduct pursuant to state policy, Town of Hallie v. City of Eau Claire, No. 82-1832 (March 27, 1985), slip op. at 10-11, it may be noted that c. 192, § 2 provides for a specific state inquiry into the ban on balance billing, above and beyond the Commissioner's regular oversight. See Blue Shield's Opposition at 40a.

"private party acting pursuant to an anticompetitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct," id. at 15; and (3) no showing of necessity is required for invocation of the state action doctrine, id. at 9, n. 21. These holdings make clear that, even before the passage of St. 1984, c. 192, the ban on balance billing was entitled to state action immunity.

The court of appeals correctly found that "the price system here at issue is one supervised by state regulators." Pet. A19. Blue Shield is a regulated private party, see pp. 2-4 above, and Mass. Gen. Laws Ann. ch. 176B always has contemplated the permissibility of the ban on balance billing. Kartell v. Blue

Shield of Massachusetts, Inc., 384 Mass. 409, 422-23, 425 N.E.2d 313, 320-21 (1981); Nelson v. Blue Shield of Massachusetts, Inc., 377 Mass. 746, 750, 387 N.E.2d 589, 592 (1979).

The petitioners argue that active state supervision is lacking because the Commissioner does not set fees for specific physician services. Petition in No. 84-1353, at 17 & n. 16; Reply Brief at 5, n. 5.[8/]

The Commissioner exercises instead the statutory responsibility of approving the methodology by which the amounts of physician payments by Blue Shield are

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8/ Contrary to the assertion of the Reply Brief at 5, no court has yet analyzed the satisfaction in this case of the second prong of the Midcal test.

determined.[9] Perhaps more important, the Commissioner is charged with reviewing the reasonableness of Blue Shield's rates to subscribers, in which the availability or not of balance billing, as well as the amounts of physician costs to Blue Shield, are integral considerations.

Moreover, the petitioners' emphasis upon the lack of state-established fee schedules confuses what is at issue in this case. The petitioners did not challenge, and the district court did not enjoin, the usual and customary method-

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9/ The selective quotation in Reply Brief at 5, n. 5 is misleading in this respect. The statute prohibits the charging of "any amount in excess of the amount of compensation determined and allowed by a medical service corporation pursuant to the applicable method of compensation approved by the commissioner . . .." (emphasis added).

ology,[10/] but the ban on balance billing. "The issue before the Court in this case is whether Blue Shield's ban on balance billing constitutes a restraint of trade . . .." Pet. A40 (emphasis added). "I rule that defendants' ban on balance billing imposes an unreasonable restraint . . .." Pet. A67 (emphasis added).

Since the ban on balance billing is clearly imposed by the state, as sovereign, as an act of government, a review of the decision of the court of appeals

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10/ As the petitioners in No. 84-1354 stressed in the court of appeals:

> Plaintiffs agree that defendants, like any other health insurer, are entitled to say to providers of service, "This is what we will reimburse you for specific services."

Intervenor-Plaintiffs' typed Brief dated July 20, 1984, Part I(A), at 22.

on the merits would serve no practical purpose to the resolution of this case.[11]

11/ The petitioners in No. 84-1354 seek rescue from this conclusion in a separate complaint for past damages. Reply Brief at 6. In light of Southern Motor Carriers' favorable implications for the state action defense for the period prior to the enactment of St. 1984, c. 192, this argument has little force. Moreover, that complaint is a dead letter under standard principles of preclusion against claim-splitting. See Restatement (Second) of Judgments, §§ 24, 25. The petitioners could have preserved a damages claim only by renewing, on cross-appeal from the final judgment, the claims they sought to raise in Kartell v. Blue Shield of Massachusetts, Inc., 687 F.2d 543 (1st Cir. 1982).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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